

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

**IN RE MISSION HEALTH
ANTITRUST LITIGATION**

No.: 1:22-cv-00114-MR

NOTICE OF SUPPLEMENTAL AUTHORITY

City of Brevard, City of Asheville, Buncombe County, and Madison County (“Plaintiffs”) submit as supplemental authority the North Carolina court’s decision in *Davis, et al. v. HCA Healthcare Inc., et al.*, 21 CVS 3276 (N.C. Super. Apr. 27, 2023) (“Apr. 27 Op.”). *See* Ex. 1. *Davis* is the state-court companion to this action, alleging state antitrust claims analogous to Plaintiffs’ federal claims. *See* ECF 43 ¶¶ 28-56, ¶¶ 111-18, 119-41. In September 2022, the *Davis* court denied the defendants’ motion to dismiss the restraint of trade claim but dismissed without prejudice the monopolization claim. Apr. 27 Op. at 2. Following the September 2022 opinion, the *Davis* plaintiffs amended the complaint, and the defendants again moved to dismiss. The April 27 Opinion largely upholds the plaintiffs’ monopolization claims and is directly relevant here, in two respects.

First, it applies here to Plaintiffs’ Section 2 claim. Plaintiffs allege that the defendants impose “all-or-nothing” contractual tying, “anti-steering” clauses, and gag clauses to harm competition in the inpatient markets in Asheville and outlying areas, in violation of Section 2 of the Sherman Act. *See, e.g.*, ECF 43 ¶¶ 125-141. The April 27 Opinion holds that substantially identical allegations state a claim for monopolization under analogous North Carolina antitrust law. Apr. 27 Op. at 14-18.

Second, the April 27 Opinion bears on the motions to dismiss. The defendants assert that the earlier opinion “rejected the claim that forcing insurers

like BCBS into accepting facilities in-network necessarily would give rise to antitrust liability.” ECF 54 at 8 n.5; *see also id.* at 4. The April 27 Opinion clarifies that the court originally dismissed the plaintiffs’ monopolization claim because the state plaintiffs had focused only on defendants’ *acquisition* of monopoly power in the Asheville inpatient market, rather than their maintenance of that power or leveraging of that power to monopolize the outlying inpatient market. Apr. 27 Op. at 13. The April 27 Opinion holds that the state plaintiffs, like Plaintiffs here, alleged that “the anticompetitive contractual provisions . . . that Defendants have coerced commercial health insurers into including has been to maintain Defendants’ monopoly” in the Asheville inpatient market, and that that is “sufficient to state a valid claim for monopolization[.]” *Id.* at 14; compare ECF 43 ¶¶ 119-149. The court also held that the plaintiffs sufficiently alleged that the defendants leveraged their Asheville inpatient market power to monopolize the inpatient market in outlying areas. Apr. 27 Op. at 15-18. Plaintiffs here allege the use of identical contractual provisions to maintain their Asheville inpatient market power and expand their market power in the outlying area inpatient market. ECF 43 ¶¶ 125-141.¹

¹ Plaintiffs also cite the earlier *Davis* opinion in opposition to the motions to dismiss. *See, e.g.*, ECF 48 at 5-6, 11-12, 14 n.16, 15 n.18.

Respectfully submitted, this the 1st day of May 2023.

/s/ Robert N. Hunter, Jr.

Robert N. Hunter, Jr.
Fred Berry
John F. Bloss
HIGGINS BENJAMIN, PLLC
301 North Elm Street, Suite 800
Greensboro, NC 27401
Phone: (336) 273-1600
Facsimile: (336) 274-4650
rnhunter@greensborolaw.com
fberry@greensborolaw.com
jbloss@greensborolaw.com

Eric L. Cramer*
Jacob M. Polakoff*
Robert Berry*
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Phone: (215) 875-3000
ecramer@bm.net
jpolakoff@bm.net

Brendan P. Glackin*
Dean M. Harvey*
LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
275 Battery Street, Suite 2900
San Francisco, CA 94111
Phone: (415) 956-1000
bglackin@lchb.com
dharvey@lchb.com

Robert E. Litan*
Daniel J. Walker*
BERGER MONTAGUE PC
2001 Pennsylvania Avenue, NW, Suite
300
Washington, DC 20006
Phone: (202) 559-9745
rlitan@bm.net
dwalker@bm.net

Daniel E. Seltz*
LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013
Phone: (212) 355-9500
dseltz@lchb.com

Counsel for Plaintiffs and the Proposed Class

*Admitted pro hac vice

**Application for admission pro hac vice forthcoming

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 1, 2023, a true and correct copy of the foregoing was filed with the Court via the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

Dated: May 1, 2023

/s/ Robert N. Hunter, Jr.
Robert N. Hunter, Jr.